84-1735

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ALEXANDER L. STEVAS,
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN VINCENT WATERS,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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SUPREME COURT, U.S.

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QUESTION PRESENTED FOR REVIEW

Whether the totality of the circumstances test for determining the admissibility of a juvenile Defendant's confession should be abandoned and replaced by the requirement that the juvenile be afforded the advice of legal counsel as a prerequisite to a valid waiver of his Miranda warnings?

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OPINIONS BELOW

The Supreme Court of Pennsylvania did not issue an opinion in this case, but did enter an order on February 14, 1985, denying Petitioner's petition for allowance of appeal from the order and opinion of the Superior Court of Pennsylvania, affirming the judgment of sentence of the Court of Common Pleas of Cumberland County, Pennsylvania (1a). The opinion and order of the Superior Court of Pennsylvania were entered October 12, 1984, and are reported at Pa. Superior Ct. , 483 A.2d 855 (1984), and are printed as Appendix D, p. 4a.

The Court of Common Pleas of Cumberland County, Pennsylvania, issued three opinions, which are printed as Appendices F, p. 18a, G, p. 33a, and H, p. 42a. Appendix H, p. 42a, is the trial court's opinion overruling petition for transfer to Juvenile Court, which is reported at 33 Cumberland Law Journal 121 (1982). Appendix G, p. 33a, is the trial court's opinion and order overruling Petitioner's motion in arrest of judgment pertaining to the charge of involuntary deviate sexual intercourse, which is reported at 33 Cumberland Law Journal 125 (1982). Appendix F, p. 18a, is the trial court's opinion and order overruling Petitioner's motions in arrest of judgment and for a new trial on the verdict of guilty of murder in the first degree, which is reported at 33 Cumberland Law Journal 131 (1982).

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on February 14, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS

The constitutional provisions which the above entitled petition involves are as follows:

Constitution of the United States, Amendment 5:

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment 14, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they

reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On October 14, 1981, the body of an 11 year old boy, Steven Turner, was found in an abandoned structure near his home in Cumberland County, Pennsylvania. Petitioner, John Vincent Waters, a 16 year old high school student, was questioned that same day concerning Turner's whereabouts.

On October 15, 1981, Waters was questioned by the police for a second time outside his residence and in the presence of his mother. Although the body of Steven Turner had been recovered, Waters was not yet a suspect.

Waters was questioned for the third time on October 25, 1981, pursuant to the request of the police that he and his father report to the municipal building for questioning concerning the death of Steven Turner. However, upon his arrival, neither Waters nor his father were advised that the former was a suspect in the death of Steven Turner. The police did advise Waters, in the presence of his father, of his *Miranda* warnings. After being advised of the *Miranda* warnings, father and son conversed for a very brief period of time, at the conclusion of which, Waters assured his father that he was not involved in the death of Steven Turner.

The police officer then asked the father if he could talk to his son alone, stating as the reason that the conversation might involve discussion of the boy's sexual activities, which the father might find embarrassing. The juvenile at all times assured his father he was not involved in

the matter, and the father agreed to allow the police officers to talk to his son alone, upon the condition that he be informed of the events arising from the conversation. It is significant to note that the police never indicated to either the boy or his father that the boy was considered a suspect.

The boy was interrogated by James J. Corbett, a retired Pennsylvania State Police Officer, with more than 30 years' experience in the field of criminal investigation and interrogation. Officer Corbett talked to Waters initially for approximately one hour, without asking any questions pertaining to the case.

The juvenile eventually made incriminating statements during the more than 2½ hour interrogation session, without any opportunity to confer with his father. At the conclusion of the incriminating statement, the juvenile was directed by the police officer to reiterate the incriminating statements for a second time for the purpose of tape recording.

Later that same day, October 25, 1981, criminal complaints were issued against the juvenile defendant, charging him with criminal homicide, murder in the first degree; criminal homicide, murder in the second degree; and involuntary deviate sexual intercourse.

Motions to transfer the case to juvenile court and seeking the suppression of the aforementioned statement were timely filed and denied by the trial court. Trial commenced on May 26, 1982, and ended with a finding of guilty on the charge of involuntary deviate sexual intercourse and the jury unable to reach a verdict on the murder charges. As a result, the trial judge declared a mistrial as to the murder charges.

Waters was retried on the murder charges on September 20, 1982, and, as a result of that trial, he was found guilty of murder in the first degree. Post-trial motions were denied and a mandatory sentence of life imprisonment was imposed upon Waters. A timely appeal was filed with the Superior Court of Pennsylvania.

The Superior Court of Pennsylvania entered its judgment on October 12, 1984, denying Waters' appeal, thereby affirming the verdict of the jury and decision of the trial court. Thereafter, Waters filed a motion to file petition for reargument nunc pro tunc in the Superior Court, which was denied by per curiam order on November 28, 1984. Thereafter, Waters filed a petition for allowance of appeal in the Supreme Court of Pennsylvania, which petition was denied by order dated February 14, 1985.

Petitioner initially raised the question of the admissibility of the incriminating statement in his omnibus pretrial motion, which was timely filed prior to trial. The issue was again raised at the suppression hearing held on March 5, 1982. The trial court denied the suppression motion by order dated March 26, 1982. The pertinent portion of the pre-trial motion is set forth in Appendix J, p. 49a and the order of March 26, 1985, is set forth in Appendix I, p. 48a.

At the second trial on the charge of criminal homicide, Petitioner renewed his omnibus pre-trial motion in the nature of a request for suppression prior to the actual commencement of trial. The exchange between counsel and the court is found in the reproduced record of the second trial at pages 212-213, which are set forth herein as Appendix K pp. 52a-54a.

On appeal Petitioner raised the issue of the admissibility of his statement in his brief submitted to the Superior Court. The reference in the brief is set forth herein as Appendix L, pp. 54a-55a. The Superior Court disposed of this issue in its opinion which is set forth herein as Appendix D, p. 4a.

REASONS FOR GRANTING THE WRIT

This case presents the court with an opportunity to examine the viability of the so-called totality of the circumstances test for determining the admissibility of confessions of juvenile criminal defendants and whether juvenile defendants should be afforded the same protections made available to adults in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

This case presents a compelling example of why the totality of the circumstances is ineffective in safeguarding the rights of juvenile defendants in the context of custodial interrogation. It establishes not only the need to extend the *Miranda* rights to juveniles, but further to ensure that juveniles are afforded not only the opportunity, but the actual advice of counsel before a valid waiver of *Miranda* can be given.

John V. Waters, Petitioner, was a 16 year old, eleventh grade student, having had no previous contacts with law enforcement authorities when he was interrogated by a 30 year veteran of the Pennsylvania State Police who was highly skilled and vastly experienced in the field of interrogation. The juvenile and his father were called to the police station as a part of an ongoing homicide investigation, but at no time were advised that the boy was a suspect, though it was clear that the police privately considered him to be a prime suspect, and the focus of their investigation had clearly centered upon him. Both father and son were advised of the *Miranda* warnings. The boy assured his father that he was not involved in the matter

under investigation. The police then asked to speak to the boy alone on the pretext that some of the conversation might involve sexual matters which the father might find embarrassing. On the basis of his son's statements and at the suggestion of the police, the father refrained from entering the interrogation room.

The interrogation proceeded for more than an hour before the boy admitted lying to his parents, but at that point had not incriminated himself. The police did not terminate the interrogation at that point to allow the boy to speak with his father or consult with a lawyer, rather they pressed forward, eventually extracting a highly incriminating statement from the youth. The statement was repeated for the purpose of tape recording and it was not until 2½ hours after the interrogation session began that the father was advised of the content of his son's statements. During the interrogation, the juvenile was subjected to the very subtle but highly coercive psychological techniques of an expert interrogator without ever having the opportunity to consult with an attorney or any other individual.

The immaturity and naivete of a youth having been questioned by a skilled interrogator points up the compelling necessity for the presence and assistance of counsel. This youth was 16 years of age, an eleventh grader, with no experience with the criminal system, and certainly had never been subjected to such intense and psychologically coercive interrogation techniques. Moreover, neither father nor son were correctly informed of the situation actually confronting the boy; indeed, they were purposely mislead. Not only did the police refrain from informing them that the boy was a suspect, but on a pretext, the po-

lice were able to dissuade the father from entering the interrogation room. John Waters' waiver of his Fifth Amendment right against self-incrimination was not knowing, voluntary and intelligent.

The psychological coercion inherent in the custodial interrogation of an uncounselled youth is inescapable. John Waters was subjected to lengthy questioning and trickery and deceit. This Court has recognized this very dilemma and the need to avoid it.

> We cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him.

Haley v. Ohio, 332 U.S. 596, 599-600, 68 S.Ct. 302, 304, 92 L.Ed. 224, 228-229 (1948).

Without adequate safeguards, a juvenile's constitutional rights become meaningless. There is no more crucial event for a criminal suspect than police interrogation, particularly for an uncounselled juvenile. Thus, this Court should depart from its holding in *Fare v. Michael C.,* 442 U.S. 707 (1979), and abandon the totality of circumstances test and decide the question not raised but recognized in *Fare.*

Whether the *Miranda* warnings are fully applicable to juveniles in an interrogation setting. This case presents this Court with the opportunity to address this issue and implement *Miranda* with full force in juvenile proceedings and to go beyond *Miranda* to ensure that the rights of juveniles are adequately protected, by requiring counsel to be present

during custodial interrogation, or at least during the waiver process. The role of the lawyer can be no more critical than where a juvenile suspected of a capital offense is to be subjected to custodial interrogation.

> The rule in *Miranda,* however, was based on this court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the fifth amendment rights of a client undergoing custodial interrogation. Because of this special ability of the lawyer to help the client preserve his fifth amendment rights once the client becomes enmeshed in the adversary process, the court found that "the right to have counsel present at the interrogation is indispensable to the protection of the fifth amendment privilege under the system" established by the court.

Id., at 469. *Fare v. Michael C.,* supra.

Moreover, the lawyer's presence helps guard against overreaching by the police and ensures that any statements actually obtained are accurately transcribed for presentation into evidence. *Fare v. Michael C.,* supra.

The mere recitation of *Miranda* warnings will not suffice to satisfy the burden which rests squarely and heavily on the government to demonstrate that a juvenile defendant has knowingly, intelligently and voluntarily waived his privilege against self-incrimination and his right to counsel. The actual assistance of counsel is necessary to give true meaning to these constitutional safeguards. Thus, Petitioner respectfully requests this Court to abandon the totality of the circumstances rule enunciated in *Fare v. Michael C.,* extend the application of the *Miranda* warnings

to juveniles and go a step further to insure that juveniles are afforded the meaningful assistance of legal counsel before being subjected to custodial interrogation.

Whether or not this Court is willing to take the steps sought by Petitioner, this case is clearly distinguishable on its facts from those presented in *Fare v. Michael C.* and should be remanded to the trial court with a direction to suppress the statement elicited from the Petitioner. John Vincent Waters was 16 years old at the time of his confession and was an inexperienced, immature juvenile having had no experience with the criminal justice system generally or police interrogation, specifically. He was thrust into a custodial situation without benefit of legal counsel or meaningful advice from his parent and was questioned out of the presence of his father by the intentional and calculated design of the police. The boy was not told he was a suspect in what was potentially a capital offense.

In stark contrast to John Waters, was Michael C. who was 16½ years old at the time of his interrogation and had considerable experience with the police, and exposure to the criminal justice system by virtue of his voluminous record of arrests, time served in a youth camp and probationary status for several years. Michael C. was sophisticated beyond his years in the ways of the criminally accused and the police. The Superior Court of Pennsylvania in its opinion and the Supreme Court of Pennsylvania which declined meaningful review of this issue did not adequately address this issue in light of *Fare v. Michael C.* This Court now has the opportunity to redress that omission and in so doing to redress a situation where a 16 year old boy with an impeccable background, both in his community, school and family, has been sentenced to serve the balance of his

natural life in prison for a conviction obtained only at a second trial which would not have been obtained without the use of his uncounseled and uninformed incriminating statement which did not result at all until a second trial was held. It would further redress the overreaching and overbearing tactics of the police over a youth and thus will give real meaning to the constitutional protections reserved for citizens of this nation to which juveniles must also be entitled.

The rule in Pennsylvania as it applied in the instant case at the time that the interrogation took place, was a rule which protected the police officer simply by having the juvenile waive the right to have an adult present. The totality of circumstances case was subsequent to the questioning which took place in this case, although the court was informed of the totality of circumstance case at the time of argument since the case had come down shortly prior to argument.

The vital portion of the need for a juvenile to have a lawyer present, is the reason that the rule that a juvenile has the right to consult with an adult and to have an adult present, was originally put into effect.

A juvenile was felt to be incapable of protecting himself properly because of his age and immaturity. Consequently, he was given the right to speak to an adult and have an adult present. Subsequently, a rule evolved which gave the juvenile a right to waive the presence of the adult, as long as the juvenile had had an opportunity to consult privately with the adult.

That rule flies in the face of the reason for having a juvenile have assistance in the first instance; if a juvenile

is incapable of protecting himself in a situation of this kind because of his youth and immaturity, then the fact that he has an opportunity to consult with an adult, and then to waive the presence of the adult in the room while he is being interrogated, demonstrates his lack of maturity and his inability to determine what is the right thing to happen for his best protection. It is even more clear that an adult, who would not enter the room of interrogation as a result of fear of being embarrassed because of a discussion of a sexual nature, is incapable of advising or protecting the rights of the juvenile who is under interrogation by a police officer with 30 years of experience as an interrogator. It is ludicrous to allow a juvenile to be submitted to this type of psychologically abusive interrogation, without the advice of an attorney who is at least presumed to have some knowledge in protecting the rights of a person being interrogated in a homicide case.

A clear example of this concern was presented in this very case at the hearing on the motion to suppress, at which another juvenile made a statement in open court. It was demonstrated by use of a tape recording which recorded the entire interrogation between the juvenile and the officer, that the testimony of the juvenile was absolutely contrary to the statement at the beginning of the interrogation. In Waters' statement, the first hour and twenty minutes of the interrogation was not recorded and it was only at the point where the officer was satisfied he could elicit an incriminating statement that he began the recording. Clearly, manipulation was present, as proven by the recording and testimony of the other juvenile pointing out all the more vividly why juveniles who are more vulnerable to this type of abuse must have the protection of an attorney.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF PENNSYLVANIA
Middle District

Carl Rice, Esq.
Prothonotary
Mildred E. Williamson
Deputy Prothonotary

434 Main Capitol Building
P.O. Box 624
Harrisburg, Pennsylvania 17108
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February 20, 1985

Arthur L. Goldberg, Esquire
P.O. Box 1268
Harrisburg, Pa. 17108

Re: Commonwealth v. John Vincent Waters, Petitioner
No. 196 M.D. Allocatur Docket 1984

Dear Mr. Goldberg:

This is to advise that on February 14, 1985 the Supreme Court entered its Order DENYING the Petition for Allowance of Appeal filed in the above-captioned matter.

Very truly yours,
(s) Mildred E. Williamson
Mildred E. Williamson,
Deputy Prothonotary

MEW/sb

Order, Superior Court of Pa., 11/28/84

APPENDIX B

THE SUPERIOR COURT OF PENNSYLVANIA
Sitting at Philadelphia

J. Haniel Henry
Prothonotary

Beatrice Curtiss
Deputy Prothonotary

2044 Old Federal Courthouse
Ninth and Chestnut Streets
Philadelphia, Pa. 19107
(215) 351-5800

November 28, 1984

Arthur L. Goldberg, Esq.
319 Market Street
P.O. Box 966
Harrisburg, Penna. 17108

Re: Commonwealth v. John Vincent Waters, Appellant
No. 433 PHILADELPHIA 1983—J# 41019/1984

Dear Mr. Goldberg:

This is to advise that the following Order has been entered in the above-captioned matter:

"AND NOW, November 28, 1984, Appellant's Motion to File Petition for Reargument Nunc Pro Tunc is denied.

s/Per Curiam"

Very truly yours,
(s) J. Haniel Henry
J. Haniel Henry
Prothonotary

JHH:rk

Judgment, Superior Court of Pa., 10/12/84

APPENDIX C

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 00433 Philadelphia 1983

Commonwealth of Pennsylvania

vs.

John Vincent Waters,

Appellant

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of CUMBERLAND County be, and the same is hereby AFFIRMED.

By the Court:

(s) J. Haniel Henry

J. Haniel Henry

Prothonotary

Dated: October 12, 1984.

APPENDIX D

OPINION OF THE SUPEIOR COURT OF PENNSYLVANIA

COM. v. WATERS

[483 A.2d 855 (Pa. Super. 1984)]

Before CIRILLO, BECK and CERCONE, JJ.

CIRILLO, Judge:

This is an appeal from a judgment of sentence entered on January 25, 1983, in the Court of Common Pleas of Cumberland County. Following a jury trial on September 23, 1982, the appellant, John Vincent Waters, was convicted of first-degree murder. This was the second trial of the appellant. In the first trial held in May, 1982, the jury had been unable to render a verdict as to the murder charge, but did find the appellant guilty of a related charge of involuntary deviate sexual intercourse, 18 Pa. C.S. §3123(4). Post-trial motions as to both the involuntary deviate sexual intercourse conviction and the murder conviction were filed and subsequently denied. The court imposed a sentence of life imprisonment for the murder conviction and a term of four to ten years to be served concurrently for the involuntary deviate sexual intercourse conviction. This appeal followed.

On October 14, 1981, the body of an eleven year old boy, Steven Turner, was found stabbed and bludgeoned to death in an abandoned farm house within a mile of his

home in Cumberland County, Pennsylvania. The body, covered by stones and boards, was discovered in the evening as a result of a search for the boy which commenced when he did not come home for dinner.

An autopsy revealed that the 4 foot 9 inch, 80 pound sixth grader had died as a result of multiple head injuries. He had sustained a massive fracture of the skull from blows to the back and the side of the head, a broken jaw on each side of the face, a stab wound to the back of the neck and a stab wound to the back of the chest. He had also been subjected to a post-mortem incise wound on the right wrist and stab wound in the front of the neck. The blade of a knife, with its handle broken off, was left in the victim's neck. The autopsy report also indicated that sperm was present in the victim's mouth.

The appellant, John Vincent Waters, a 152 pound, sixteen year old, 5 foot 8 inch high school student told police during an original canvass of the neighborhood, that he had last seen the victim on the afternoon he disappeared. He told the police that he had observed the victim getting into an unknown car which subsequently drove out of the development.

As a result of a further canvass of the neighborhood, the police obtained a steak knife from the appellant's mother. The knife which she had in her house matched the one found at the murder scene including the blade which had been left in the victim's throat.

On October 25, 1981, the police requested that the appellant and his father report to the municipal building for questioning concerning the homicide. The appellant was given the *Miranda* warnings in the presence of his father. Thereafter he and his father consulted with each

other. The appellant waived his rights and agreed to speak to the police without having his father present. His father had no objection to such an interrogation.

During the course of the questioning, the appellant made an inculpatory statement, admitting that he had engaged in oral intercourse with the victim and then had killed him.

On appeal, the appellant alleges that the court erred in failing (1) to transfer the proceeding to juvenile court, (2) to suppress his October 25 statement, (3) to grant a mistrial after the publication of prejudicial news stories, (4) to cover several suggested points for charge, and (5) to permit counsel in his closing to discuss the applicable penalties of the offenses. The appellant also challenges the constitutionality of the involuntary deviate sexual intercourse statute and of the imposition of a mandatory life sentence. We find that none of the appellant's allegations are meritorious and accordingly affirm the judgment of sentence.

The appellant alleges that his case should have been transferred to the juvenile court. He had filed a pre-trial motion requesting such a transfer, but it had been denied. At the time of his arrest, the appellant was sixteen years old, but due to the nature of his offenses, the proceedings were instituted in criminal court.

Under the Judicial Code, 42 Pa. C.S. §6322(a), the court has the discretion to transfer appropriate cases to juvenile court. It is, however, the burden of the petitioner, herein the appellant, to prove that he does not belong in criminal court. *Commonwealth v. Pyle,* 462 Pa. 613, 342 A.2d 101 (1975). This is accomplished by demonstrating

a need for and an amenability to programs for rehabilitation, supervision, and care provided by the juvenile court system. *Commonwealth v. Wallace,* 495 Pa. 295, 433 A.2d 856 (1981). If the evidence does not affirmatively establish that the petitioner would benefit from such programs and there exists no special reason to spare the youthful offender from adult prosecution, jurisdiction remains within the criminal court. *Commonwealth v. Pyle, supra.*

Although the hearing court noted that the appellant's personal background and lack of a prior record were factors supporting transfer, the nature and circumstances of the crime, specifically the violent, aggressive and willful conduct of the appellant, as well as the need to protect the community, militated against it.

We are satisfied that, under the instant circumstances, the court was warranted in denying the appellant's petition to transfer. This result is in accord with the great weight of authority. *See Commonwealth v. Sourbeer,* 492 Pa. 17, 422 A.2d 116 (1980); *Commonwealth v. Wade,* 485 Pa. 453, 402 A.2d 1360 (1979); *Commonwealth v. Barber,* 275 Pa. Super. 144, 418 A.2d 653 (1980).

The appellant next contends that the trial judge erred in denying the motion to suppress his statement made to police on October 25, 1981, a statement that was vital to the Commonwealth's case. Specifically, the appellant asserts that the police, in conducting the interrogation, did not comply with the "interested adult rule" as promulgated in *Commonwealth v. McCutchen,* 463 Pa. 90, 343 A.2d 669, *cert. denied,* 424 U.S. 934, 96 S.Ct. 1147, 47 L.Ed. 2d 341 (1975).

The *McCutchen* rule provided that no juvenile could waive his *Miranda* rights without being provided with an

opportunity to consult with an interested adult, who is informed of the juvenile's rights and is interested in the welfare of the juvenile. However, the Pennsylvania Supreme Court has overruled the *McCutchen* rule in two recent decisions.

In *Commonwealth v. Christmas,* 502 Pa. 218, 465 A.2d 989 (1983), the Court created a rebuttable presumption that a juvenile is incompetent to waive his Constitutional rights without first having the opportunity to consult with an interested and informed adult.

> [T]here shall exist a *presumption* that a statement derived in the absence of . . . an opportunity for consultation [with an interested and informed adult] is inadmissible, but that presumption shall be regarded as rebutted where the evidence *clearly demonstrates* that the statement was in fact knowingly and voluntarily given.

Id. at 223, 465 A.2d at 992.

Last April the Supreme Court overruled *Christmas* in *Commonwealth v. Williams,* Pa. , 475 A.2d 1283 (1984). "We now reject the application of a rebuttable presumption that a juvenile is incompetent to waive his Constitutional rights without first having an opportunity to consult with an interested and informed adult." *Id.* at , 475 A.2d at 1287. In place of the *Christmas* rebuttable presumption the Court in *Williams* substituted a totality of the circumstances test. "The protection against the use of involuntary confessions . . . is met by application of the totality of circumstances analysis to all questions involving the waiver of rights and the voluntariness of confessions made by juveniles." *Id.* at , 475 A.2d at 1288.

The *Williams* Court listed some factors which should be considered in determining whether a juvenile's confession was knowingly and freely given. "Among these factors are the juvenile's youth, experience, comprehension, and the presence or absence of an interested adult." *Id.* More specifically, the *Williams* Court held the confession valid in that case since the defendant's physical condition was normal at the time of his arrest and detention; he was not subjected to physical or psychological abuse; he was of normal intelligence and responsive to questions asked of him; both defendant and his father were informed of defendant's rights prior to the confession; defendant's father was present during the interrogation and when defendant waived his rights and made a confession; and defendant and his father had a continuing opportunity to confer in the presence of authorities. *Id.*

Applying the *Williams* test to the instant case, we hold that the appellant knowingly and intelligently waived his *Miranda* rights and made a voluntary confession. The record shows that appellant, 16, was of normal intelligence and responsive to questions asked of him. There is no evidence that appellant was subjected to physical or psychological abuse. Both appellant and his father were informed of appellant's *Miranda* rights on two occasions prior to their private conference out of the presence of the officers. (N.T. 8-9)[1] After appellant and his father consulted privately, the officers again advised them of appellant's

[1] To this extent, the authorities in the instant case went further in the attempt to safeguard appellant's rights than the officers in *Williams*, where neither the juvenile defendant nor his father were advised of defendant's *Miranda* rights prior to their private conference.

Miranda rights. Both the appellant and his father indicated that they wanted to waive appellant's rights and both agreed that the appellant would talk to the police without his father being present (N.T. 10-11). During the course of questioning that followed, the appellant on numerous occasions indicated that he did not object to talking to the officers alone without his father (N.T. 11). Appellant then confessed to the murder.

Based on all the relevant facts and circumstances, it is clear from the totality of the circumstances that the appellant's confession was knowingly, intelligently, and voluntarily made. The fact that appellant's father was not present during the interrogation does not invalidate the confession because both the appellant and his father were in full agreement prior to the interrogation that appellant would waive his rights and give a statement. Therefore, the lower court properly denied appellant's motion to suppress the confession.

The appellant next challenges the denial of his motion for a mistrial, which was prompted by several allegedly prejudicial articles published in *The Evening Sentinel*, three days after trial had begun. The appellant argues that because of the inflammatory nature of the publicity, prejudice to the appellant must be presumed and a new trial granted.

The decision to declare a mistrial is within the sound discretion of the trial judge and will not be reversed absent a flagrant abuse of discretion. *Commonwealth v. Conti*, 236 Pa. Super. 488, 345 A.2d 238 (1975).

The record demonstrates that on three occasions at the end of each day's proceedings, the judge instructed the jury to avoid publicity and discussion of the case. None of

the jurors revealed any noncompliance with these instructions when asked on the morning after the publication of the objectionable articles. Therefore, we must conclude that the jury was not exposed to the damaging edition of *The Evening Sentinel,* thereby precluding any prejudice to the appellant. The motion for a mistrial was properly denied.

The appellant also asserts, as grounds for a new trial, the trial judge's refusal to instruct the jury in accordance with the appellant's proposed instructions. However, since no specific objections were made prior to the jury's deliberations, as required by Pa. R. Crim. P. 1119(b), these objections are deemed waived and can not serve as the basis for a new trial. *Commonwealth v. Watlington,* 452 Pa. 524, 306 A.2d 892 (1973). Assuming arguendo that the issues had been preserved, it is well settled that a trial judge is not required to accept a requested instruction verbatim, even if legally correct and timely filed. The court may select its own form of expression, so long as the issue is adequately, accurately and clearly presented to the jury. *Commonwealth v. Gardner,* 246 Pa. Super. 582, 371 A.2d 986 (1977). Our review indicates that all points for charge requested by the appellant were properly rejected as superfluous.

Next the appellant cites as error the court's refusal to permit defense counsel to discuss the penalties of the offenses in his closing argument. Punishment is a matter solely for the court and not for the jury to know or to consider during its deliberations. *Commonwealth v. Lucier,* 424 Pa. 47, 225 A.2d 890 (1967). Accordingly, any reference to penalties made in closing would have been improper.

The appellant lastly challenges the constitutionality of the involuntary deviate sexual intercourse statute, 18 Pa. C.S. §3123(5), as violative of equal protection, and the imposition of a mandatory life sentence for first-degree murder, 18 Pa. C.S. §1102(a), as cruel and unusual punishment as well as violative of equal protection.

Section 3123(5) imposes criminal sanctions on any person "who engages in deviate sexual intercourse with another person who is less than 16 years of age." We acknowledge that this statute creates a classification based upon age but maintain that such classification is reasonable, and not violative of the Equal Protection Clause.

The Fourteenth Amendment forbids arbitrary discrimination by the states against persons or classes, but it permits the Commonwealth, as part of its police power, to create and define a criminal offense through classifications of persons so long as these classifications are reasonable and the legislation bears equally on all in the same class. *Commonwealth v. Lewis,* 443 Pa. 305, 279 A.2d 26, *cert. denied* 404 U.S. 1003, 92 S.Ct. 571, 30 L.Ed. 2d 556 (1971). Thus, a classification will be held valid if there is any conceivable basis upon which it may relate to a legitimate government interest.

We therefore hold that the age classification in 18 Pa. C.S. §3123(5) is not arbitrary but rather rests upon a real and substantial difference between the maturity of adults and that of youth. As the hearing court noted in its opinion of August 24, 1982, denying defendant's post-trial motions:

> We conclude that such an interest—society's interest in fostering healthy surroundings to yield well-

adjusted citizens, free of social and psychological scars—exists and that it is served by a blanket prohibition on all deviate sexual experiences between young adolescents.

The appellant's challenge to the constitutionality of a mandatory sentence of life imprisonment in cases of first-degree murder where the death sentence is not applicable is similarly without merit.

As the Superior Court noted in *Commonwealth v. Bryant*, 239 Pa. Super. 43, 361 A.2d 350 (1976):

> It is well settled that the fixing of penalties for crimes is a legislative function, *United States v. Wallace*, 269 F.2d 394, 398 (3d Cir. 1959), and it is a maxim of constitutional law that the legislature will be presumed to have acted within constitutional limits, *Atchison, Topeka, and Santa Fe R. Co. v. Matthews*, 174 U.S. 96, 104, 19 S.Ct. [609] 612, 43 L.Ed. 909 (1899). It is also well established that the burden of demonstrating the unconsitutionality of a legislative enactment is upon the person alleging the act's unconstitutionality. [Citations omitted]. We therefore should not declare an act of assembly void unless its violation of the Constitution is so clear as to preclude doubt or hesitation. *Commonwealth v. Lukens*, 312 Pa. 220, 223, 167 A. 167 (1933).

Id. at 46, 361 A.2d at 351.

The appellant has not met his burden in this case. A mandatory life sentence, as established by the legislature, is clearly not cruel and unusual punishment for the crime of first-degree murder. Indeed, this issue has already been decided in *Commonwealth v. Sourbeer, supra*, 492 Pa. at

33, 422 A.2d at 123, in which the Supreme Court stated that a mandatory life sentence:

> is not cruel and unusual punishment for it is not an excessive and unnecessary punishment disproportionate to the crime and does not shock the moral conscience of the community. These considerations, coupled with the fact that life sentences lack the ponderous finality of the death penalty, induce us to uphold mandatory life sentences for murder in the first degree.

The appellant also contends that the sentencing statute is unconstitutional because it fails to provide for consideration of mitigating or aggravating circumstances. A similar challenge was made and rejected in *Commonwealth v. Dessus*, 262 Pa. Super. 443, 396 A.2d 1254 (1978), in which the Superior Court recognized the significant difference for Eighth Amendment purposes between a sentence of life imprisonment and one of death, a distinction emphasized by Justice Brennan in the landmark case of *Furman v. Georgia*, 408 U.S. 238, 290, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972) (Brennan, J., concurring). Simply stated, the Eighth Amendment requirement for individualized consideration of offender and crime in capital cases has not been extended to noncapital offenses.

Determinations regarding the appropriateness of individualized sentencing for noncapital cases are within the province of the legislature. For first-degree murder, where the death sentence is not applicable, our legislature has seen fit to impose a mandatory life sentence, choosing to deny the judiciary the discretion allowed in sentencing many other types of offenders. Its decision to do so does not violate the United States or Pennsylvania Constitutions.

Nor are the equal protection clauses of the United States and Pennsylvania Constitutions violated by the legislature's decision to preclude consideration of individual characteristics. The legislature, in enacting this statute, has given all offenders in noncapital first-degree murder cases the same punishment: the removal of the offender from society for the remainder of his life. This is constitutionally valid.

We therefore affirm the judgment of sentence.

BECK, J., concurred in the result.

APPENDIX E

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

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893 Criminal 1981

Commonwealth

v.

John Vincent Waters
OTN: B-803489-1

Charge: (A) Criminal Homicide (Murder—1st degree);
(C) Involuntary Deviate Sexual Intercourse
Affiant: Ptl. Sidney Deyo

RE: DEFENDANT APPEARS FOR SENTENCE

ORDER OF COURT

AND NOW, January 25, 1983, at 10:04 A.M., the defendant, JOHN VINCENT WATERS, having appeared for sentence with personal counsel, Arthur L. Goldberg, Esquire, following conviction at jury trial,

On Count A, sentence of the court is that the defendant pay the costs of prosecution and undergo imprisonment in a state correctional institution for the balance of his natural life, sentence to be computed from October 25, 1981;

Sentence, Court of Common Pleas

On Count C, sentence of the court is that the defendant pay the costs of prosecution and undergo imprisonment in a state correctional institution for a period of not less than four (4) years nor more than ten (10) years, sentence to run concurrent with the sentence imposed in Count A.

By the Court,
Dale F. Shughart, *P.J.*

APPENDIX F

[33 Cumberland Law Journal 131 (1982)]

IN THE COURT OF COMMON PLEAS OF CUMBERLAND COUNTY, PENNSYLVANIA

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893 Criminal 1981

Commonwealth

v.

John Vincent Waters

Charge: Criminal Homicide (Murder—First Degree)
Affiant: Ptl. Sidney Deyo

IN RE: MOTIONS IN ARREST OF JUDGMENT AND FOR A NEW TRIAL

Before SHUGHART, P.J., SHEELY, J. and HOFFER, J.

OPINION AND ORDER OF COURT

The defendant, John Waters, was found guilty of first degree murder after a jury trial on September 23, 1982. This was the second time Waters had been tried on the charge of criminal homicide; a May 1982 trial had resulted in a hung jury. In that first trial, however, Waters was

found guilty of a related charge of involuntary deviate sexual intercourse. Posttrial motions to that verdict have been denied, and the defendant is now asking that the verdict of first degree murder be set aside. For the reasons set forth below, his motions must be denied.

The history of this case reveals a particularly tragic event, one that has unreversably altered the lives of two local families. While all homicides are inherently abhorant, this one is particularly so, for the victim and aggressor were both minors. The victim was an eleven-year-old boy; the defendant was sixteen at the time of the slaying. Nevertheless, because of the nature of the crime, the defendant was tried and convicted as an adult. He has reasserted his challenge to our decision denying his pretrial motion to transfer the case to juvenile court, but for the reasons enunciated in our April 23, 1982 opinion in support of the initial decision, we believe a transfer would have been inappropriate and therefore decline to reverse that decision. We feel our opinion filed at that time adequately states our reasons and shall not further comment thereon. A copy of that decision is attached and incorporated herein.

The defendant also contends that the trial judge erred in denying his motion to suppress a statement made to the police on October 25, 1981—a statement that was vital to the Commonwealth's case against him. In particular, he argues that the Commonwealth failed to comply with the "interested adult" rule, as recognized by the Pennsylvania Supreme Court in *Commonwealth v. McCutchen,* 463 Pa. 90, 343 A.2d 669, *cert. denied,* 424 U.S. 934 (1975). That rule offers additional protection to a juvenile by requiring that, for a valid waiver of Fifth and Sixth Amendment rights to be recognized,

(1) the juvenile must be given the opportunity to consult with an adult;

(2) the adult must be one who is genuinely interested in the welfare of the accused juvenile; [and]

(3) the interested adult must be informed and aware of those Fifth and Sixth Amendment rights guaranteed to the juvenile.

Commonwealth v. Barnes, 482 Pa. 555, 560, 394 A.2d 461, 464 (1978).

The testimony at the pretrial suppression hearing revealed that the defendant did indeed receive the benefit of these procedural safeguards. The defendant and his father were asked to come to the municipal building on the afternoon of October 25, 1981, for additional questioning concerning the apparent homicide of Steven Turner, a neighbor boy whose body was found just a week and half earlier. N.T. 5-6.[1] Both the defendant and his father were quite aware of the subject of the inquiry; the interrogating officer testified at the suppression hearing that he had informed both of them that the defendant was a suspect in the case. N.T. 8. The father does not recall the word "suspect" being mentioned, but on the other hand he cannot be sure that it was not. N.T. 60. Regardless of the actual words used, it is inconceivable to us that either the defendant or his father was unaware that, at that time, the police suspected the defendant of involvement in the death of Steven Turner. At any rate, the defendant was given the Miranda warnings, in the presence of his father, and he and

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[1] Page references are to the Notes of Testimony of the March 5, 1982, suppression hearing.

his father were given an opportunity to consult in private, which they did. N.T. 9. Thereafter, the defendant waived his rights and agreed to talk to the police without his father being present. N.T. 11. The father likewise had no objection to his son being questioned alone. N.T. 9-10 & 55. During the course of the questioning that followed, the defendant confessed to the killing of Steven Turner. He was then arrested and charged with criminal homicide and involuntary deviate sexual intercourse.

In challenging the legal validity of his confession, the defendant has raised several issues as to the scope of the interested adult rule. The first issue is whether the presence of an interested adult is required during the actual police interrogation.

The proposition that the presence of an interested adult is required during the questioning of a juvenile appears to be unsupported in Pennsylvania case law. Moreover, based upon the weak support in the Supreme Court for the interested adult rule, as evidenced by its near rejection in *Commonwealth v. Henderson*, 496 Pa. 349, 437 A.2d 387 (1981) and *Commonwealth v. Veltre*, 492 Pa. 237, 424 A.2d 486 (1980), an extension of the per se rule would likely meet with disapproval on appeal. Accordingly, notwithstanding the ever-present test for voluntariness, the interested adult rule will be applied as expressly stated by the Supreme Court, without additional, inflexible prerequisites being engrafted in the absence of specific legislative or appellate direction.

Our review of the relevant case law leaves little doubt as to what the Supreme Court has required in this area. Simply stated, a juvenile must be given an opportunity to

consult with an interested adult *prior* to waiving his Fifth and Sixth Amendment rights. *Commonwealth v. Henderson,* 496 Pa. 349, 437 A.2d 387 (1981); *Commonwealth v. McCutchen,* 463 Pa. 90, 343 A.2d 669, *cert. denied,* 424 U.S. 934 (1975). It was the opportunity for a parent to give counsel before that parent's child answered police questions that was deemed so important to a plurality of the court in the seminal case of *Commonwealth v. Roane,* 459 Pa. 389, 329 A.2d 286 (1974), and at no time since has the court held, expressly or impliedly, that an adult's presence during actual questioning is essential.

To the contrary, our appellate courts have upheld the validity of juveniles' confessions made in the absence of an interested adult. As recently as in *Commonwealth v. Hill,* Pa. Superior Ct. , 451 A.2d 1019 (1982), the Superior Court recognized the validity of a juvenile's confession made after consultation with his mother, but without an interested adult present during the questioning. The court emphasized, as the Supreme Court has done so often in the past, that what is important is not the mere presence of an adult at the questioning; rather, it is the juvenile's opportunity to consult with an informed, interested adult prior to questioning that provides the needed safeguard to compensate for the disadvantage of youth.

In a case factually similar to the one before us, and one we find controlling, the Pennsylvania Supreme Court upheld the validity of a juvenile's confession made while alone with the police, even though the juvenile's parent was in the police administration building at the time. *Commonwealth v. McFadden,* 470 Pa. 604, 369 A.2d 1156 (1977). Like the defendant and his father in our case, neither the juvenile nor his mother in *McFadden* requested

to see each other during the questioning. Nevertheless, the requirements of the interested adult rule were met since the mother was present when her son's rights were explained to him and since an opportunity to consult was provided.

Not requiring an interested adult to be present during questioning is entirely consistent with the view that a juvenile's Fifth and Sixth Amendment rights "are personal to the accused and therefore may only be waived by him, not the adult." *Commonwealth v. Smith,* 472 Pa. 492, 502, 372 A.2d 797, 802 (1977). *See also Commonwealth v. Barnes,* 482 Pa. 555, 394 A.2d 461 (1978); *Commonwealth v. Webster,* 466 Pa. 314, 353 A.2d 372 (1975). Moreover, any suggestion that a sixteen-year-old is legally incapable of waiving his constitutional rights and confessing to a crime is in direct conflict with case law and devoid of constitutional validity. *Commonwealth v. Webster, supra.*

The second issue raised by the defendant is whether the police were obligated to stop the questioning when the defendant made statements that were materially different from those made to his father. In essence, an affirmative response to this question would presuppose that, to be "informed" within the meaning of the interested adult rule, an adult must be informed of the juvenile's involvement in the criminal activity. Therein lies the weakness of this argument. To be informed within the rule means not to be informed of the juvenile's involvement, for as a practical matter the police could not possibly know what the juvenile has told the adult nor could they even begin to enforce such a requirement; rather, an "informed" adult is one who has been made aware of the juvenile's Fifth and Sixth

Amendment rights. *Commonwealth v. Barnes,* 482 Pa. 555, 394 A.2d 461 (1978). There is no dispute that defendant's father was informed of these rights; therefore, he was informed and the police had no further obligation to inform him as to the results of the questioning as it was occurring. If the defendant lied to his father regarding his involvement, then he, and not the people of this Commonwealth, must bear the consequences.

The last issue concerning the defendant's confession is whether defendant's father was himself mature enough to consitute an informed, interested adult under the rule. We have no hesitancy in rejecting any argument that he was not such a person. The father, a man who has been steadily employed for the U.S. Government for a number of years in responsible positions, gave every indication of understanding his son's rights as guaranteed by the Constitution and of being interested in his son's welfare. There is simply no indication to the contrary. Of course, the argument could always be made that no person who was genuinely interested in another person's welfare would ever allow the police to question that person when the potential for adverse effects was present. By the same token it could be argued that confessions are per se invalid because to confess to a crime is not an intelligent decision when the result could be life imprisonment or even death. Nevertheless, our system of justice does permit the use of confessions, even confessions by juveniles. Perhaps the defendant would not have confessed had he been advised by legal counsel, but that is not the test. The fact remains that he received the benefit of all the procedural safeguards required by law, including the opportunity to consult with his father, whom the police were quite justified in believ-

ing was interested in his son's welfare. Lastly, we remind the defendant that it was his decision whether or not to confess to the police not his father's. In light of the evidence indicating that the confession was voluntary and accompanied by all mandated safeguards, the confession was properly admitted into evidence at trial.

The defendant next challenges the denial of his motion for a mistrial made at the beginning of the fourth and last day of the trial. The motion was prompted by numerous allegedly prejudicial articles that appeared in *The Evening Sentinel*, a Carlisle daily, on the evening of the third day. The defendant, relying on cases that deal with pretrial publicity as grounds for a change of venue, argues that because of the inflammatory nature of the publicity, prejudice to the defendant should be presumed and a new trial granted.

The defendant's reliance on change-of-venue cases is misplaced. However ill-advised inflammatory trial publicity might be, the question at this stage of the proceedings is not whether the community has been so saturated with inflammatory publicity to render impossible the opportunity of obtaining an impartial, unprejudiced panel of jurors. Such a panel had already been secured, thus our sole concern is the possible effect the alleged inflammatory publicity had on an untainted jury.

When dealing with a sworn panel, prejudice will not be presumed. Experience has shown just how serious jurors take their task, particularly in homicide cases. In the absence of evidence to the contrary, the jury will be presumed to have followed the court's instructions and to have responded truthfully to special queries. The record before us reflects that on three occasions, at the end of each

day's proceedings, the jury was instructed to avoid any publicity or discussion about the case. Trial 5, 100 & 212. None of the jurors revealed any noncompliance with these instructions when asked on the morning after the objectionable publicity. Trial 213. Therefore, we must conclude that the jury was not exposed to the September 22nd edition of *The Evening Sentinel.* Since the jurors did not read the articles, the defendant could not have been prejudiced by them. Therefore, his motion for a mistrial was properly denied. *See Commonwealth v. Morrison,* 180 Pa. Superior Ct. 121, 118 A.2d 258 (1955), *cert. denied,* 352 U.S. 823 (1956).

The defendant has also raised as grounds for a new trial the trial judge's refusal to instruct the jury as requested in the defendant's proposed jury instructions. However, since no specific objections were made before the jury retired to deliberate, as required by Pa. R. Crim. P. 1119(b), any objections to the charge as given are deemed waived and cannot serve as the basis for a new trial. *Commonwealth v. Watlington,* 452 Pa. 524, 306 A.2d 892 (1973). In any event, we find all three points for charge to have been properly rejected.

Proposed instruction number 12 reads as follows: "Psychiatric testimony concerning a defendant's mental capacity and condition at the time he purportedly made a confession is admissible on the question of his ability to give such a statement." The relevance of this instruction escapes us since the record was devoid of any psychiatric testimony as to the defendant's mental capacity and condition at the time he made the confession. Therefore, as a superfluous instruction, it was properly rejected. *See Commonwealth v. Strong,* 484 Pa. 303, 399 A.2d 88 (1979).

Proposed instruction number 20 was also properly rejected. That instruction read as follows:

> Since you may consider the character testimony presented on behalf of defendant as substantial and positive evidence which may of itself create a reasonable doubt to produce an acquittal, it may certainly be used as well to determine that the defendant would not be guilty of first degree murder, second degree murder or third degree murder, or any other inclusive charge. Even though the defendant has an interest in the case, the defendant's testimony should be considered in the same manner as all other testimony of other witnesses in the case.

It is well settled that "a trial judge is not required to accept a requested instruction verbatim, even if legally correct and timely filed. The court is free to select its own form of expression, so long as the issue is adequately, accurately and clearly presented to the jury." *Commonwealth v. Gardner,* 246 Pa. Superior Ct. 582, 590, 371 A.2d 986, 989 (1977). "Where the basic charge properly covers a requested point, it is not error for the trial judge to refuse to give additional instructions." *Id.* The general charge adequately covered the issue of character testimony, *see* Trial 228-29; thus there was no need to read the first sentence of proposed instruction number 20 verbatim. As for the second sentence, it is entirely irrelevant to the topic of character testimony and bears no relation to the prior sentence. It is superfluous and its rejection cannot be said to be reversible error.

The final rejection of a proposed instruction to which the defendant now objects is number 2, which was a request to the court to inform the jury of the penalties appli-

cable to each of the possible verdicts. The defendant also cites as error the trial judge's refusal to allow defense counsel to discuss the penalties in his closing argument. Clearly both rulings were correct. Unless a statute provides otherwise—which none does—"punishment is a matter solely for the court and not the jury to know or consider during its deliberations." *Commonwealth v. Lucier*, 424 Pa. 47, 49, 225 A.2d 890, 891 (1967); *Commonwealth v. Chism*, 480 Pa. 233, 389 A.2d 1041 (1978) (plurality opinion). Accordingly, any reference to the penalties would have been improper.

The defendant's last argument concerns the constitutionality of a mandatory sentence of life imprisonment in cases of first degree murder where the death sentence is not applicable. The defendant gives two reasons why such a sentence is unconstitutional. First, he argues that mandatory life imprisonment is cruel and unusual punishment, violative of the Eight Amendment. Second, he argues that its imposition in this case would constitute a denial of equal protection of the law under the federal and state constitutions.

As the Superior Court noted in *Commonwealth v. Bryant*, 239 Pa. Superior Ct. 43, 361 A.2d 350 (1976):

> It is well settled that the fixing of penalties for crimes is a legislative function, *United States v. Wallace*, 269 F.2d 394, 398 (3d Cir. 1959), and it is a maxim of constitutional law that the legislature will be presumed to have acted within constitutional limits, *Atchison, Topeka, and Santa Fe R. Co. v. Matthews*, 174 U.S. 96, 104, 19 S.Ct. 612, 43 L.Ed. 909 (1899). It is also well established that *the burden of demonstrating the unconstitutionality of a legislative*

> *enactment is upon the person alleging the act's unconstitutionality.* [Citations omitted.] We therefore should not declare an act of assembly void unless its violation of the Constitution is so clear as to preclude doubt or hesitation. *Commonwealth v. Lukens,* 312 Pa. 220, 223, 167 A. 167 (1933).

Id. at 46, 361 A.2d at 351 (emphasis added).

The defendant has not met his burden in this case. A mandatory life sentence, as established by the legislature, is clearly not cruel and unusual punishment for the crime of first degree murder. Indeed, this issue has already been decided by our Supreme Court in *Commonwealth v. Sourbeer,* 492 Pa. 17, 422 A.2d 116 (1980). In *Sourbeer* the defendant was fourteen years old at the time of the murder. Like Waters, Sourbeer challenged the constitutionality of a mandatory sentence of life imprisonment for first degree murder. Although there was no majority opinion of the court, it is significant that not one justice expressed agreement with the defendant's position on this issue. The judgment of the court reflected the court's unanimous rejection of defendant's position. Unchallenged was the plurality's holding that mandatory life imprisonment for murder in the first degree

> is not cruel and unusual punishment for it is not an excessive and unnecessary punishment disproportionate to the crime and does not shock the moral conscience of the community. These considerations, coupled with the fact that life sentences lack the ponderous finality of the death penalty, induce us to uphold mandatory life sentences for murder in the first degree.

Id. at 33, 422 A.2d at 123-24.

The defendant also contends that the sentencing statute is unconstitutional because it fails to provide for consideration of mitigating or aggravating circumstances. A similar challenge was made and rejected in *Commonwealth v. Dessus,* 262 Pa. Superior Ct. 443, 396 A.2d 1254 (1978), where the defendant, a life prisoner, had received a mandatory life sentence upon conviction of assault. The Superior Court obviously recognized the significant difference for Eighth Amendment purposes between a sentence of life imprisonment and one of death, a distinction emphasized by Justice Brennan in the landmark case of *Furman v. Georgia,* 408 U.S. 238, 290 (1972) (Brennan, J., concurring). Simply stated, the Eighth Amendment requirement for individualized consideration of offender and crime in capital cases has not been extended to noncapital offenses. The Supreme Court has recognized that,

> in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. . . . Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.

Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion).

Determinations regarding the appropriateness of individualized sentencing for noncapital cases are within the province of the legislature. For first degree murder, where the death sentence is not applicable, our legislature has

seen fit to impose a mandatory life sentence, choosing to deny the judiciary the discretion allowed in sentencing many other types of offenders. Its decision to do so does not violate the United States or Pennsylvania Constitutions. *See State v. Borden,* 605 S.W.2d 88 (Mo. 1980).

Nor are the equal protection clauses of the United States and Pennsylvania Constitutions violated by the legislature's decision to preclude consideration of individual characteristics. The defendant argues that by not allowing consideration of an offender's age in determining the length of the sentence, the legislature is treating offenders the same, even though they might not be similarly situated. For example, a seventy-year-old convicted murderer may spend only five years in prison while a seventeen-year-old could conceivably stay incarcerated nearly sixty years. In essence, the defendant is arguing that mandatory determinate sentences are always unconstitutional because the sentences constitute a different percentage of the offenders' lives depending upon their ages at the time of sentencing. Under defendant's theory, reference to accuarial tables would be constitutionally required in sentencing.

The defendant cites no authority for this novel proposition and for good reason: the analysis simply has no basis in constitutional law. Even though the legislature may differentiate on the basis of age, *see, e.g., Carey v. Population Services International,* 431 U.S. 678 (1977); *Commonwealth v. Waters,* No. 893 Criminal 1981 (Cumberland Co., filed August 24, 1982), there is no requirement that it do so. Under the statute being challenged, the legislature has decided to treat all adults in noncapital first degree murder cases the same. All of them, regardless of age, are similarly situated in all that have been convicted of first

degree murder. No further classifications are made, and none are mandated by the Constitution. Each offender receives the same punishment: loss of his freedom for life. Whether such punishment is greater for a seventeen-year-old than a sixty-year-old is a question for the philosophers, not the judiciary or the legislature. We do know that from society's standpoint the sentences are the same. Each offender, regardless of age, is removed from society for the remainder of his life, barring commutation of his sentence. In sum, the imposition of a mandatory life sentence for the inherently hideous crime of first degree murder is constitutionally valid.

ORDER OF COURT

AND NOW, December 29, 1982, for the reasons appearing in the opinion filed this date, the defendant's motions in arrest of judgment and for a new trial are hereby overruled and the District Attorney is directed to schedule the defendant for sentence.*

By the Court,
(s) Dale F. Shughart, *P.J.*

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*No presentence investigation required in the case of a mandatory sentence to life imprisonment. 42 Pa. C.S. §9731.

APPENDIX G

[33 Cumberland Law Journal 125 (1982)]

IN THE COURT OF COMMON PLEAS OF CUMBERLAND COUNTY, PENNSYLVANIA

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893 Criminal 1981

Commonwealth

v.

John Vincent Waters

Charges: Criminal Homicide, §§2501, 2502(a) (b), Pa. Crimes Code; Involuntary Deviate Sexual Intercourse, §3123(5), Pa. Crimes Code

Affiant: Ptl. Sidney Deyo

IN RE: MOTION IN ARREST OF JUDGMENT

Before SHUGHART, P.J., SHEELY, J. and HOFFER, J.

OPINION AND ORDER OF COURT

At a May 24-26, 1982, jury trial the defendant was found guilty of involuntary deviate sexual intercourse, a violation of section 3123 of the Crimes Code of December 6, 1972, as amended, 18 Pa. C.S.A. §3123. That verdict is

now being challenged in the defendant's motion in arrest of judgment on the grounds (1) that section 3123(5) of the Crimes Code is unconstitutional as a denial of equal protection of the law and (2) that the evidence was insufficient to support the verdict.

In section 3123(5) the legislature has clearly reflected its intent to impose criminal sanctions on *any person* who "engages in deviate sexual intercourse[1] with another person who is less than 16 years of age." 18 Pa. C.S.A. §3123(5). The victim in the present action was eleven years of age, well within the protected age group. The constitutional challenge of the defendant, however, concerns not the age of the victim, but the age of the defendant, sixteen at the time of the offense.

The defendant's argument is bottomed on what he perceives to be the unequal treatment of minors under section 3123(5). The statute, he argues, classifies minors into two groups: those under sixteen years of age who are not subject to the criminal sanctions of section 3123(5), and those sixteen to eighteen who are. The result is different treatment for persons similarly situated (minors in general). The defendant contends that this classification by age is arbitrary and unreasonable, violative of the equal protection clauses of the United States and Pennsylvania Constitutions.

Fatal to the defendant's argument is its faulty premise, namely, that two consenting minors under the age of

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[1] Deviate sexual intercourse is defined as "[s]exual intercourse per os or per anus between human beings who are not husband and wife, and any form of sexual intercourse with an animal." 18 Pa. C.S.A. §3101.

sixteen could not be prosecuted under section 3123(5). Acceptance of this premise is necessary before we can accept the proposition that minors are treated differently under the statute, a necessary step in the defendant's equal protection analysis. Several reasons are advanced in support of this premise, all of which we reject.

The defendant acknowledges that under the clear language of the statute two minors under the age of sixteen could be prosecuted for engaging in consensual deviate sexual intercourse, but he argues that such an interpretation is unreasonable and should be rejected. Although the defendant is not alone in his belief that disparity of age should be an important consideration in the prosecution of sex offenders, *see, e.g.,* Model Penal Code §207.5 comments (Tenative Draft No. 4 1955), we refuse to conclude that the contrary view, that the age of the defendant is immaterial, is unreasonable. The Pennsylvania Legislature is not alone in this view; the sexual offense statutes of many states are silent as to any minimum age requirement for the defendant, apparently reflecting the legislatures' intent that the age of the defendant be immaterial. *See, e.g.,* Kan. Stat. Ann. §21-3503 (1981); Mass. Gen. Laws Ann. ch. 265, §23 (West Supp. 1970-1981); Mich. Stat. Ann. §28.788 (2)-(4) (1982); Mont. Rev. Codes Ann. §§45-5-501 to -503 (1981); N.H. Rev. Stat. Ann. §§632-A:2-:3 (Supp. 1979); Utah Code Ann. §76-5-406 (1978); Vt. Stat. Ann. tit. 13, §3252(3) (Supp. 1981). *See also Michael M. v. Superior Court of Sonoma County,* 450 U.S. 464, 493 (1981) (Brennan, J., dissenting). One state, Illinois, expressly provides for the prosecution of both minors between the ages of fourteen and eighteen who engage, even consensually, in deviate sexual conduct. *See*

Ill. Ann. Stat. ch. 38, §11-5(a) (Smith-Hurd 1979). *See also* Ky. Rev. Stat. Ann. §§510.070(1)(b)2, .090(1)(a) (Baldwin 1969) (age of defendant is immaterial). It should be noted that the defendant could have been prosecuted even in many of the states that have minimum age or age disparity requirements. *See, e.g.,* Alaska Stat. §11.41-.410(3) (Supp. 1981); Colo. Rev. Stat. §18-3-403 (1973); Del. Code Ann. tit. 11, §762 (1979); Md. Ann. Code art. 27, §464A (1982); Minn. Stat. Ann. §609.342 (Supp. 1982); N.C. Gen. Stat. §14-27.4 (1981); S.C. Code §16-3-655 (Supp. 1981); Tex. Penal Code Ann. tit. 5. §21.10 (Vernon 1974); W. Va. Code §61-8B-5 (1977); Wyo. Stat. §6-4-303(a)(2) (1977). *See generally* ABA, *Child Sexual Abuse and the Law* (1981). In sum, we do not believe that an interpretation of section 3123(5) is unreasonable merely because it allows prosecution of two minors under the age of sixteen who consensually engage in deviate sexual intercourse. When statutes are "clear and free from all ambiguity," the courts should not interpose its judgment in place of the legislature's. Statutory Construction Act of 1972, as amended, 1 Pa. C.S.A. §1921. The legislature has not set a minimum age or disparity of age requirement in section 3123(5), as it did in the immediately preceding statutory rape provision (18 Pa. C.S.A. §3122), and we decline to do so. Accordingly, we must reject the defendant's argument that section 3123(5) classifies minors who are potential defendants into two groups, treating each differently. The defendant's equal protection argument consequently fails.

We do not agree with the defendant that our interpretation of section 3123(5) is inconsistent with the Pennsylvania Supreme Court's ruling in *Commonwealth v. Bon-*

adio, 490 Pa. 91, 415 A.2d 47 (1980). In *Bonadio* the court struck down the state's voluntary deviate sexual intercourse statute on constitutional grounds. Unfortunately, no opinion commanded the support of a majority of the justices.[2] Under any reading of the case, however, the court did not go so far as to recognize a right to sexual privacy that would encompass consensual sexual conduct between minors. The states' authority to differentiate between adults and minors, even in the area of sexual behavior, has long been recognized, with restrictions placed upon minors subject to less stringent review. *See Carey v. Population Services International,* 431 U.S. 678 (1977); *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976); *Ginsberg v. New York,* 390 U.S. 629 (1968); *Prince v. Massachusetts,* 321 U.S. 158 (1944). The only question is whether the restrictions imposed in section 3123(5) rationally serve a valid state interest. *Carey,* 431 U.S. at 707 (Stewart, J., concurring); *see also Moyer v. Phillips,* 462 Pa. 395, 341 A.2d 441 (1975); *People v. Santibanez,* 91 Cal. App. 3d 287, 154 Cal. Rptr. 74 (1970). *See generally Felix v. Milliken,* 463 F. Supp. 1360 (E.D. Mich. 1978) (review of equal protection analysis). We conclude that such an interest—society's interest in fostering healthy surroundings to yield well-adjusted citizens, free of social and psychological scars—exists, and that it is served by a blanket prohibition on all deviate sexual experiences between young adolescents.

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[2] In *Commonwealth v. Waters,* 281 Pa. Superior Ct. 535, 422 A.2d 598 (1980), the superior court relied on the equal protection rational in *Bonadio,* and not the privacy right grounds, in reversing a conviction for voluntary deviate sexual intercourse. The marital-nonmarital classification, the court held, did not bear a rational or logical relationship to a valid state interest.

Assuming *arguendo* that minors under the age of sixteen could not constitutionally be prosecuted for consensual deviate sexual behavior,[3] the prosecution of minors sixteen years of age and older for deviate sexual intercourse with younger minors would still be permitted. The classifications drawn by the legislature need not be perfect; they need only be rationally related to a legitimate state interest, at least when dealing with a nonfundamental right.[4] *Dandridge v. Williams,* 397 U.S. 471 (1970). Similar treatment for all minors is not required in every situation, especially in the area of sexual activity, where protection of the younger, less socially, physically, and emotionally mature children is of greater concern than of the older adolescents. In short, in the areas of sexual and social development, all minors are not similarly situated. Our experience of more than thirty years in the juvenile court system leads to the firm conclusion that many sixteen and seventeen year olds are sexually active. The legislature could rationally conclude that, in order to protect the young

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[3] The constitutionality of section 3123(5) as applied to consenting minors under the age of sixteen is not at issue here; the defendant has no standing to assert the rights of that group. *See United States v. Brewer,* 363 F. Supp. 606 (M.D. Pa.), *aff'd,* 491 F.2d 751 (3d Cir. 1973); *cert. denied,* 416 U.S. 990 (1974) (*citing United States v. Raines,* 362 U.S. 17 (1960)); *Commonwealth v. Heinbaugh,* 467 Pa. 1, 354 A.2d 244 (1976); Note, *Standing to Assert Constitutional Jus Terii,* 88 Harv. L. Rev. 423 (1974).

[4] A minor does not have a fundamental right to engage in deviate sexual intercourse. *State v. Santos,* 413 A.2d 58 (R.I. 1980). *See Doe v. Commonwealth's Attorney for City of Richmond,* 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd without opinion,* 425 U.S. 90 (1976); *Ginsberg v. New York, supra; Commonwealth v. Bonadio, supra.*

children fifteen years of age or younger from the possible physical and psychological damage resulting from deviate sexual intercourse—more often than not a homosexual experience—criminal liability should attach at age sixteen, and not eighteen. Otherwise, those sexually active teenagers sixteen and seventeen years of age could take advantage of younger, less prepared children, undeterred by the threat of legal sanctions. The legislature also could rationally conclude that deviate sexual experiences between consenting minors below the age of sixteen would tend to be innocuous, posing less of a threat to the future physical, psychological, and social well-being of the participants than similar experiences with older people. In sum, even if the legislature intended to treat sixteen and seventeen year olds differently for the purposes of prosecution than those minors fifteen and younger—an intent not reflected in section 3123 (5)—such treatment would not be violative of the equal protection clauses of the United States and Pennsylvania Constitutions.

The classifications drawn in the statutory rape section of the Crimes Code, 18 Pa. C.S.A. §3122 (Supp. 1974-1981), do not mandate a different conclusion. According to the defendant, the legislature has impermissively legislated morals by prohibiting consensual deviate sexual intercourse between minors while permitting, without the threat of prosecution, "accepted" sexual activity, namely, vaginal intercourse. In effect, the legislature, the defendant submits, is in the business of making moral decisions as to what types of sexual behavior are acceptable. We agree that the effect of the statutory rape and involuntary deviate sexual intercourse provisions is just that; without doubt deviate sexual conduct among minors is subject to greater

restrictions. Nevertheless, we do not agree that such differentiation of sexual conduct is unconstitutional.

The legislature's classification by type of sexual conduct does not constitute a denial of equal protection of the law. The legislature could have rationally concluded, and apparently did conclude, that greater damage may result from adolescent deviate sexual experiences than from procreative heterosexual experiences. *See generally* D. MacNamara and E. Sagarin, *Sex, Crime, and the Law* 88 (1977). Such was the view of the Kentucky Legislature, as reflected in Ky. Rev. Stat. Ann. §510.070(1)(b)2 (Baldwin 1969). Ill-equipped to judge the validity of this proposition, we are bound to accept the legislature's judgment in this area. The defendant has not cited any authority to support his proposition that classifications based on type of sexual activity are unreasonable. In fact, case law would indicate otherwise. *See, e.g., Doe v. Commonwealth's Attorney for City of Richmond, supra.* Accordingly, the distinction drawn by the statutes is not unconstitutional.

In light of our rejection of the defendant's constitutional challenges to section 3123(5), the issue raised in his challenge to the verdict on the sufficiency of the evidence is rendered moot. The Commonwealth is not burdened with proving that the sexual intercourse was nonconsensual, *Commonwealth v. Hughlett,* 249 Pa. Superior Ct. 341, 378 A.2d 326 (1977), even though the defendant-participant was less than eighteen years of age. Not even the defendant argues that the evidence was insufficient to prove consensual deviate sexual intercourse between the defendant and the eleven-year-old victim. Accordingly, the verdict will stand.

Opinion, Court of Common Pleas, 8/24/82
Order

ORDER OF COURT

AND NOW, August 24, 1982, for the reasons appearing in the opinion filed this date, the defendant's motion in arrest of judgment is hereby denied. The Probation Department is directed to prepare a presentence investigation report, after which the District Attorney shall call the defendant for sentencing.

By the Court,
(s) Dale F. Slughart, *P.J.*

APPENDIX H

[33 Cumberland Law Journal 121 (1982)]

IN THE COURT OF COMMON PLEAS OF CUMBERLAND COUNTY, PENNSYLVANIA

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893 Criminal 1981

Commonwealth

v.

John Vincent Waters

Charge: (A) Criminal Homicide (First Degree);
(B) Criminal Homicide (Second Degree);
(C) Involuntary Deviate Sexual Intercourse
Affiant: Pvt. Sidney Deyo

IN RE: PETITION FOR TRANSFER TO JUVENILE COURT

Before SHUGHART, P.J.

OPINION AND ORDER OF COURT

John Waters was arrested on October 25, 1981 on charges of criminal homicide,[1] first degree murder,[2] second degree murder,[3] and involuntary deviate sexual inter-

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[1] 18 Pa. C.S. §2501.
[2] 18 Pa. C.S. §2502(a).
[3] 18 Pa. C.S. §2502(b).

course,[4] all in connection with the death of an eleven-year-old boy whose body was found on October 14, 1981, near the defendant's residence in Hampden Township. The defendant was sixteen years old at the time of his arrest and is now seventeen. Because of the nature of the offenses, proceedings were instituted against Waters in the criminal court. Subsequently, he filed a petition seeking to have his case transferred to juvenile court. This is the issue presently before us.

In a case such as this, the defendant has the burden of proving that he does not belong in criminal court. *Commonwealth v. Pyle,* 462 Pa. 613, 342 A.2d 101 (1975). He must do this by "showing his need of . . . and amenability to programs for rehabilitation, supervision and care provided by the juvenile court system." *Commonwealth v. Wallace,* 495 Pa. 295, , 433 A.2d 856, 858 (1981). If the evidence does not affirmatively establish that the defendant would benefit from the juvenile court system and if there is no special reason to spare the youthful offender from adult prosecution, jurisdiction remains within the criminal court. *Commonwealth v. Pyle, supra.*

Here, the defendant has had no prior contact with the juvenile court. He is an above average student and he apparently has not had disciplinary problems in school. Testimony offered on his behalf tended to show that the defendant is capable of following instructions and that he is responsive to adult supervision. Dr. Hume, a qualified psychiatrist who examined the defendant, described him as shy and socially underdeveloped. Dr. Hume opined that the defendant would be amenable to treatment in the juve-

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[4] 18 Pa. C.S. §3123(5).

nile system and that there are facilities in the juvenile system capable of treating him.

While it must be conceded that the defendant's personal make-up and lack of a prior record are factors in favor of transferring his case to juvenile court, there are other factors which must be considered. Namely, the nature and circumstances of the crime must be taken into consideration, including whether the crime was committed in a violent, aggressive, or willful manner. *See Commonwealth v. Pyle,* 462 Pa. 613, 623 n. 14, 342 A.2d 101, 106-7 n. 13 (1975). In this respect, the pathologist described the victim's injuries in the instant case as including, *inter alia,* multiple skull fractures and brain contusions; abrasions of the face, neck, forehead, shoulders, right hand, and right leg; a fractured vertebra in the neck area; and three stab wounds, including one in the back of the neck; one in the middle of the back, and one in the front of the neck. Additionally, there is evidence of sexual contact from the presence of sperm in the victim's mouth. Also in evidence is a statement made by the defendant which portrays an intentional killing. This evidence is certainly capable of supporting a conclusion that the killing was willful and violent.

Protection of the community is also a relevant consideration in such cases. Therefore we must consider whether the safety of the community requires lengthy incarceration. *Id.* Here, the victim was eleven years old. He was four foot nine inches tall and weighed 80 pounds. The defendant was sixteen years old, five foot eight inches tall, and weighed 150 pounds at the time of his arrest, less than two weeks after the homicide. This disparity in age, height, and weight, when coupled with other evidence in the case,

would be sufficient for a jury to conclude that the defendant sexually abused a much younger and smaller child and then took his life to conceal his actions. Protection of the community demands a lengthy incarceration if the defendant is convicted.

In cases such as this the juvenile system is woefully inadequate. An original commitment is limited in duration to three years and such commitment must be reviewed by the juvenile court every six months. Juvenile Act of July 9, 1976, P.L. 1586, No. 142, as amended, 42 Pa. C.S.A. §6353(a). Although a three year commitment is possible, realistically, experience teaches that the juvenile facilities in this Commonwealth are not geared towards dealing with an adjudicated delinquent for such an extended period of time. Dr. Hume, the defendant's own witness, testified that the security facilities with which he was familiar usually held adjudicated delinquents—including two for homicides—for less than one year. This is consistent with our own experience. Furthermore, even with extended commitments, the defendant could only be held in the juvenile system until he attained the age of twenty-one, a period of less than four years. This period of incarceration is too short to ensure rehabilitation, it is too short to ensure protection of the community, and it is too short to be adequate retribution for such a heinous crime.

The defendant argues that he should be given special consideration because he was not the aggressor. We are far from convinced that his version of the incident, embodied in his statement, is an accurate account of the incident. Suffice it to say, from the evidence introduced, a jury could conclude that the defendant was the aggressor in this incident.

Even if the defendant was not the aggressor, his response to the alleged attack is the best evidence of society's need for protection. The defendant was nearly twice the size of the victim, yet his response to the alleged assault was unbridled rage, so far out of proportion to the alleged attack that it is frightening. The defendant's uncontrollable rage is complicated by the fact that his actions were apparently never foreshadowed by any prior violent outbursts. It is this unpredictable violence which makes the defendant dangerous and which is why, in a large part, if he is convicted, he must be incarcerated for a longer period of time than a juvenile commitment would allow.

Dr. Hume testified that he did not believe that the defendant was entirely candid with him. Further, he testified that a lack of candor would hinder treatment. This court cannot, in good conscience, consider a juvenile commitment of a short duration when there is a risk that the defendant would hinder his own treatment by not being open, for to do so would be to gamble with the lives and safety of members of the community. To counter the argument that a juvenile commitment would be of insufficient duration, the defendant argues that when he reaches the age of twenty-one and is no longer subject to the jurisdiction of the juvenile court, his treatment could be continued through a mental health commitment. This argument cannot be accepted. Dr. Hume testified that the defendant does not meet any of the diagnostic nomenclature of mentally ill and that there is no basis to involuntarily commit him.

We are satisfied that under the circumstances of this case, society's need to apply restraint outweighs the defendant's need for treatment as a juvenile. The defendant's re-

quest to transfer his case to juvenile court must therefore be denied. This result is in accord with the great weight of authority. *See Commonwealth v. Sourbeer,* 492 Pa. 17, 422 A.2d 116 (1980); *Commonwealth v. Wade,* 485 Pa. 453, 402 A.2d 1360 (1979); *Commonwealth v. Pyle,* 462 Pa. 613, 345 A.2d 101 (1975); *Commonwealth v. Barber,* 275 Pa. Superior Ct. 144, 418 A.2d 653 (1980). *See also Commonwealth v. Pettus,* 492 Pa. 558, 424 A.2d 1332 (1981); *Commonwealth v. Wallace,* 495 Pa. 295, 433 A.2d 856 (1981). Indeed, the defendant has not cited us to a single authority wherein the court transferred a murder case such as this to juvenile court.

ORDER OF COURT

AND NOW, April 23, 1982, the defendant's motion to transfer his case to juvenile court is denied.

By the Court,
(s) Dale F. Shughart, *P.J.*

Order, Court of Common Pleas, 3/26/82

APPENDIX I

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

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893 Criminal 1981

Commonwealth

v.

John Vincent Waters

Charge: (A) Criminal Homicide (First Degree);
(B) Criminal Homicide (Second Degree);
(C) Involuntary Deviate Sexual Intercourse
Affiant: Ptl. Sidney Deyo

IN RE: OMNIBUS PRE-TRIAL MOTION
Before SHUGHART, P.J.

ORDER OF COURT

AND NOW, March 26, 1982, after careful consideration of the testimony, the briefs filed and oral argument, the defendant's motion to suppress the statement made by the defendant be and is hereby overruled.

By the Court,
Dale F. Shughart, *P.J.*

APPENDIX J

IN THE COURT OF COMMON PLEAS
CUMBERLAND COUNTY, PENNSYLVANIA

Criminal No. 893 1981

Commonwealth of Pennsylvania

v.

John Vincent Waters

Charges: Criminal Homicide, §§2501, 2502(a), (b) Pa. Crimes Code; Invol. Dev. Sex. Inter. §3123(5) Pa. Crimes Code

OMNIBUS PRE-TRIAL MOTION

AND NOW, this 18th day of December, 1981, comes the defendant, John Vincent Waters, by his attorneys, Goldberg, Evans & Katzman, and moves your Honorable Court as follows for relief under Rule No. 306 of the Pennsylvania Rules of Criminal Procedure:

I. MOTION TO SUPPRESS

1. Defendant moves to suppress all oral or transcribed statements of the defendant, whether by machine transcription or oral transcription converted into writing which were taken from defendant, by virtue of the manner in which the said statements were taken.

Omnibus Pre-Trial Motion

2. It is believed that the statements were taken in violation of the Constitutional rights of the defendant in that the defendant, a minor, sixteen (16) years of age, was permitted to have his father present, and after telling his father certain matters which would have clearly been exculpatory, it was suggested by the officers that the discussion with the defendant be held outside of the presence of the father of defendant, and the discussion was so held.

3. The father of defendant felt that since the statement would have been exculpatory, that it was not necessary for either he or counsel to be present during the taking of the statement, and the defendant was permitted to give a statement outside of the presence of his father or counsel.

4. Further, that a long period of time, in excess of one hour and possibly two hours, was taken with preliminary discussions and other matters obtaining the confidence and good will of the defendant by an experienced police questioner, and after all of the matters were discussed and the confidence of the defendant, a sixteen (16) year *of* [sic] juvenile, was obtained by the police officer, and the questions and answers were reviewed and determined prior to the time when any recording or stenographic notes were taken, when the officer felt that the questions would be forthcoming from the defendant in a manner as would be most detrimental to the position of the defendant, a recording device was turned on, with the understanding of the defendant, but with the defendant believing that the statement he was giving was in his best interest, and was in accordance with what had been reviewed beforehand with the officers, thereafter a statement was given in violation of his rights to have an adult or counsel present.

Omnibus Pre-Trial Motion

5. It is felt that under the circumstances, this juvenile defendant was incapable of making the determination as to what was in his own best interests and that his rights were violated in not having an adult present or counsel present.

WHEREFORE, defendant moves your Honorable Court to suppress the statement and any information or evidence that was obtained as a result of information gained from the said statement.

* * *

APPENDIX K
EXCERPT, REPRODUCED RECORD

* * *

the court officials whom you now all know so that it can be reported to the court. We also ask that you not read anything about the case that may appear in the newspaper, view it on television if there is any such thing, or listen to it on radio. In other words, we ask—you are going to go home and we're not going to interfere with your lives except to insist that you remain confidential on this case until you have rendered a verdict in the case.

And with that we will excuse you and return tomorrow morning at 9:30; be ready to start at 9:30 tomorrow morning.

(Court was adjourned at 4:45 p.m. and reconvened at 9:37 a.m. with all parties present in the courtroom.)

September 21, 1982

MR. GOLDBERG: May we approach the bench for one moment, Your Honor.

Sidebar

MR. GOLDBERG: Your Honor, for the record I would like to make it clear that all the motions filed in the other case we would ask that they be considered filed in this case without the refiling of new papers, and the rulings that the court made in the other case, up to this point in trial, be considered as rulings in this case as well rather than refile the same papers over again.

THE COURT: Specifically—I'm not . . .

MR. GOLDBERG: Pretrial motions.

THE COURT: Pretrial motions, of course, would be unquestionably part of the record.

R-212

MR. GOLDBERG: That's all I want, I want to bring everything up to date.

THE COURT: In other words, to be specific, you want to preserve your right to object to the statement that was taken?

MR. GOLDBERG: That is our basic one, and I don't know if there will be other ones, but I want to preserve the ones for the record.

THE COURT: I am not at all sure if they have to be preserved.

MR. BAYLEY: I'm not either.

THE COURT: It is my understanding, for the record, you may, in a motion for new trial, reassert all of the rulings that the court made prior to the last time.

End of Sidebar

(Mr. Bayley then presented opening remarks to the jury, followed immediately by Mr. Goldberg, concluding at 10:09 a.m.)

MR. BAYLEY: Officer Deyo.

SIDNEY DEYO, having been duly sworn, according to law, testified as follows:

Excerpt, Reproduced Record

Direct Examination

BY MR. BAYLEY:

Q. Your name is?

A. Officer Sidney Deyo, D-E-Y-O, Hampden Township Police.

Q. And how long have you been a Hampden Township policeman, sir?

R-213

* * *

APPENDIX L

EXCERPT, SUPERIOR COURT BRIEF

* * *

agreed to allow the police officers to talk to the juvenile alone, upon the condition the father be informed of the events arising from the conversation. The police never indicated to the father at this time that his son was considered a suspect (R.R. at 82).

The police officers' custodial interrogation of the juvenile went on for more than an hour, approximately 1:38 p.m. to 2:47 p.m., before the juvenile made any statement to the effect he had lied to his parents (R.R. at 65). The police officer doing the questioning, Chief James J. Corbett, was a retired state police officer with over thirty years experience in the field of criminal investigations and interrogations.

Officer Corbett admitted that he talked to the juvenile for approximately one hour without asking the juvenile any questions and without any comments by the juvenile. It was at the end of this lecture by Chief Corbett that the juvenile admitted he had lied to his parents about his involvement in the matter (R.R. at 51-52, 65).

Excerpt, Superior Court Brief

The interrogation was not stopped at this point to allow the juvenile to confer with his father. The police officers continued the interrogation, and the juvenile allegedly made incriminating statements about the incident

* * *

84-1735

Office-Supreme Court, U.S.
FILED
MAY 9 1985
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

NO. OCTOBER TERM, 1984

JOHN VINCENT WATERS,
Petitioner

V.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

BRIEF IN OPPOSITION TO THE PETITIONER'S WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

J. MICHAEL EAKIN
DISTRICT ATTORNEY
ATTORNEY FOR PETITIONER

CUMBERLAND COUNTY COURT HOUSE
CARLISLE, PENNSYLVANIA 17013
PHONE: (717) 249-1133, EXT. 231

BEST AVAILABLE COPY

QUESTION PRESENTED

Has the Petitioner herein raised any issues of merit requiring review by this Court?

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OPINIONS BELOW

In this matter the Pennsylvania Supreme Court did not issue an opinion, but did enter an order, denying the defendant's petition for allowance of appeal, on February 14, 1985. The opinion of the Pennsylvania Superior Court, affirming the judgment of the Court of Common Pleas of Cumberland County, is reported at ___ Pa. Superior Ct. ___, 483 A.2d 855 (1984). The Court of Common Pleas issued a total of three opinions. These opinions overruled the defendant's petition to transfer his case to juvenile court, overruled the defendant's motion in arrest of judgment regarding one offense charged

against the defendant, and overruled the defendant's post-trial motions challenging his conviction of first degree murder. These are reported, respectfully, at 33 Cumberland L.J. 121 (1982), 33 Cumberland L.J. 125 (1982), and 33 Cumberland L.J. 131 (1982).

JURISDICTION

The Commonwealth of Pennsylvania objects to the basis of jurisdiction invoked by the defendant, as more fully set out herein.

CONSTITUTIONAL PROVISIONS

The Commonwealth of Pennsylvania finds the citation of constitutional provisions by the defendant to be accurate, but objects to the manner in which they are raised in his Petition for Certiorari, as more fully set out herein.

STATEMENT OF THE CASE

On October 14, 1981, the body of eleven year old Steven Turner was found in an abandoned farmhouse. The body had been partially concealed with old wooden boards and rocks. Uncontested results of an autopsy performed on the boy revealed that death resulted from multiple head injuries. Steven Turner sustained a fractured jaw, a massive fracture of the skull, a stab wound to the back, and a stab wound to the back of the neck. His wrist had been cut, and one more stab wound in the front of his neck contained the blade of the knife apparently used in the attack.

Traces of sperm were found in the victim's mouth.

John Vincent Waters, the defendant/petitioner herein, was questioned several times regarding the death of Steven Turner. On October 25, 1981, State Trooper James Corbett requested the defendant and his father to come to the Hampden Township Police Station for questioning in connection with the Turner murder.

Testimony at the defendant's suppression hearing established that father and son arrived at the station that same day. (In re: Motion to Suppress, Notes from Testimony (N.T.) at 6). Both were immediately told that the questioning pertained to the death

of Steven Turner (N.T. at 7). Miranda rights were explained in detail to both father and son. Both were told that John was considered a suspect in the Turner murder (N.T. at 8). A waiver of rights form was read to Mr. Waters and his son, and the defendant read the form over by himself (N.T. at 9-11). The defendant signed the waiver form, and seemed at ease during the questioning (N.T. at 11). This session of questioning resulted in the defendant confessing to the crimes for which he was convicted.

In his post-trial motions, the defendant alleged that the Suppression Court misapplied the then-applicable Pennsylvania "Interested Adult" Rule,

which required an interested adult to consult with the juvenile before a valid waiver of Miranda rights could be effected. In subsequent appeals, the defendant challenged the way in which this and one other test was applied, rather than challenging the constitutionality of the tests themselves.

REASONS IN OPPOSITION TO CERTIORARI

The defendant offers 28 U.S.C. §1257(3) as a ground for invoking the jurisdiction of this Court. Respondent submits that jurisdiction should not be accepted on this ground. That statute "requires that in the state courts petitioner have 'specially set up or claimed under the Constitution of the United States' that right which (he) now seeks to have this Court enforce." Webb v. Webb, 451 U.S. 493, 495, 101 S.Ct. 1889, 1891, 68 L.Ed. 2d 392, 395 (1981). In the courts below, the defendant specifically based his claims on the alleged misapplication of the "interested

adult" rule, a constitutional safeguard imposed pursuant to the requirements of Pennsylvania's Constitution. At no point in his post-trial motions did the defendant raise any claims based specifically on the federally-based policies represented by Miranda warnings.

The defendant's allegations went solely to the issue of whether the "interested adult rule" was correctly applied. After the Superior Court applied the "totality of the circumstances" test, the defendant then argued that this test was misapplied. The defendant never raised issues of federal scope, particularly issues based on this Court's holding in

Fare v. Michael C., 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed. 197 (1979), a case he now wishes this Court to overrule.

In sum, a challenge to the adequacy of the Fare v. Michael C., supra, holding based on federal constitutional grounds was raised for the first time in the defendant's Petition for Certiorari. No claims based on any federal constitutional principles had been raised in the state courts. Pursuant to the limitations contained in 28 U.S.C. §1257 and recognized in the Webb decision, supra, this Court should deny review of the issues contained in the defendant's petition.

In any event, Respondent submits that the totality of the circumstances

test provides adequate safeguards for a juvenile who is accused of a crime:

> This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so. The totality approach permits--indeed, it mandates--inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

Fare v. Michael C., supra, 442 U.S. at 725, 99 S.Ct. at 2572, 61 L.Ed. 2d at ___. The defendant points to numerous circumstances surrounding his confession to show the inadequacy of this test as applied to juveniles. Clearly, however, the very purpose of this flexible test is to include consideration of the age, experience, and maturity of a defendant where that may be relevant. The beauty of the "totality of the circumstances" test is its ability to allow consideration of all factors in each particular case.

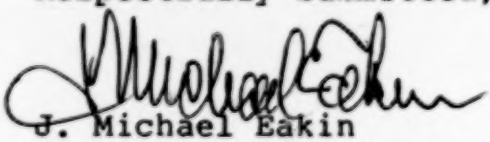
One final factor which weighs against the defendant's petition is the lack of a need for clarification by this Court in this area. The defen-

dant has not demonstrated that any significant conflicts between federal or state high courts require this Court to clarify matters. Indeed, the defendant cannot even claim that the Pennsylvania Supreme or Superior Courts passed upon a federal matter in his own case. It is submitted that the defendant in this case merely restates facts into a formulation favorable to his position, and then attempts to argue the "unfairness" of the totality of the circumstances test. Not only does such an approach ignore the true version of facts as found by the trial court, but it does not suffice as a basis to invoke this Court's jurisdiction by certiorari.

CONCLUSION

WHEREFORE, the Commonwealth of Pennsylvania requests this Honorable Court to deny the defendant's Petition for Certiorari.

Respectfully submitted,



J. Michael Eakin
District Attorney